IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein comes and respectfully prays that said cause be reheard and the opinion of this Court filed on January 29, 1940, be reconsidered because of the mistaken interpretation by the Court of petitioner's argument, written and oral, upon the issues involved in the case in that the Court understood the petitioner to concede that the

decedent, under the powers of appointment held by her, could have appointed to her estate or her creditors; also because of errors of law apparent upon the face of the record.

The decision of the Court is based upon the mistaken assumption on its part that petitioner "conceded that, under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors" (Cert. Op. p. 2). Because of this supposed concession, the Court found that it was immaterial whether the law of Wisconsin had defined a power such as decedent held, to be a special power under the law of Wisconsin, and not a general power of appointment. The Court, also, upon the same supposed concession of petitioner, held that the powers of appointment were "general within the intent of the Revenue Act, notwithstanding they may be classified as special by the law of Wisconsin" (Cert. Op. p. 2).

The Court again said (Cert. Op. p. 3) in connection with its comments upon the case of *Leser* v. *Burnet*, 46 F. (2d) 756, cited by petitioner, that because petitioner "conceded that the decedent in this case could have appointed to her estate or her creditors," decedent had a general power within the meaning of Section 302f, thus holding, in effect, that because of such concession this case did not fall within the rule of *Leser* v. *Burnet*.

Petitioner respectfully submits that these statements of the Court admit of no other construction than that the Court's reason for its holding that the powers here are general, within the meaning of the Revenue Act, is the supposed concession by petitioner that Elizabeth S. Morgan, the decedent, under the law of Wisconsin, could have appointed to her estate or her creditors. If the assumption that the petitioner so conceded be erroneous, then the Court

had no law of Wisconsin before it holding that the powers in the Stephenson instruments (or powers similar thereto, as in *Cawker* v. *Dreutzer*, 197 Wis. 98) permitted the donee to appoint to her estate or her creditors. The petitioner could not have conceded as asserted in this opinion because there is no law, either federal or of the State of Wisconsin, to justify such a concession.

Petitioner's same supposed concession was apparently the reason for the Court's holding that the instant case was not within the rule laid down in *Leser* v. *Burnet*, for the reason that in *Leser* v. *Burnet* the petitioner therein denied that, under the law of Maryland, the decedent could have appointed to her estate or her creditors, and in the case at bar the court assumes, albeit mistakenly, that the petitioner *conceded* that, under the law of Wisconsin, the decedent could have appointed to her estate and her creditors.

Petitioner now states to the Court that neither he nor his counsel nor any one representing him has ever conceded, directly or by inference, by written or spoken word, that the decedent could have appointed to her estate or her creditors. On the contrary, the petitioner has constantly and consistently maintained throughout the entire four years in which this case has been presented to the Commissioner, the Board of Tax Appeals, the Circuit Court of Appeals, and this Court, that she did *not* hold a general power of appointment and consequently, that she could not have appointed to her estate or her creditors. The Court says in its opinion that the question here (Cert. Op. p. 1) is "to what extent and in what sense the law of the decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of the statute." The Court held in effect, that when Congress used in the statute the adjec-

tive "general" to designate the power to be taxed, Congress had it in mind that the words of the definition of a general power in the regulations as a "power to appoint to any person or persons," meant "anyone, including his own estate or his creditors." In this case, therefore, any references by the court or counsel to "general powers of appointment" mean powers under which the donee may appoint to anyone, including her own estate or her creditors (Cert. Op. p. 3).

Petitioner's arguments in his brief that decedent could not have appointed to her estate or her creditors were ordinarily in the form of his statements that the powers held by decedent were "not general powers of appointment," or were "not general powers of appointment within the intent of the Revenue Act," or "not general powers under the federal law." All these designations mean powers of appointment under which the donee may appoint to his estate or his creditors.

The fact that Section 232.05 of the Wisconsin Statute on Powers defines a general power of appointment to be one to appoint "to any alienee whatever," in no way militates against petitioner's contention that the decedent in the instant case did not, under the law of Wisconsin, hold a general power of appointment. The Supreme Court of Wisconsin in *Cawker* v. *Dreutzer*, 197 Wis. 98, construed Section 232.05 and held, despite the words "to any alienee" therein, that the words in the Cawker will, to appoint, by *will*, as distinguished from a "conveyance" or "grant", "to any person or persons," did *not* give to the donee under that power a general power of appointment. It follows, therefore, that the power of appointment in the *Cawker* case did not give to the donee, under the law of Wisconsin, "a power to appoint anyone, including her estate or creditors." The holding of the Court in the *Leser*

case, which petitioner also cites in his brief and relies upon, is to the same effect with respect to the law of Maryland and based on the same reasoning.

It is erroneously stated in respondent's brief (p. 13) that "Petitioner does not deny that * * * the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion"; also brief (p. 27) that "The beneficiaries may have appointed their creditors, corporate or otherwise." These statements are most surprising, in view of petitioner's repeated denials in his brief that the decedent held a general power of appointment, under which she could appoint to her estate or her creditors. The most casual reading of petitioner's brief discloses his contention, often stated, that under the authority of the case of *Cawker* v. *Dreutzer*, 197 Wis. 98, the decedent in the instant case held *only* a special power of appointment and *not* a general power, within the meaning of the federal law. The Court in its opinion agrees that petitioner took this position, by stating (Cert. Op. p. 2) "The petitioner urges that by statute and decision Wisconsin has defined as special a power such as she held." Despite this statement, in the same sentence of the opinion, the Court states (erroneously, as petitioner respectfully submits) that petitioner "conceded that under the law of Wisconsin the decedent could have appointed any one to receive the trust property, including her estate and her creditors."

This very statement of the Court shows the total misapprehension by the Court of petitioner's position, and the Court's error in stating that petitioner conceded that the decedent, holding only a special power, could have appointed to her estate or her creditors.

In support of petitioner's denial that he ever conceded that the decedent could have appointed to her estate or

her creditors, but on the contrary that he constantly pressed upon the Court by oral and written arguments, that she did not hold general powers of appointment and therefore could not have appointed to her estate or her creditors, petitioner presents the following:

A.

During the oral arguments of counsel before the Court on January 4 and 5, 1940, Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?" Counsel for respondent answered: "She could." Counsel for petitioner answered: "She could not." Despite this positive denial by counsel for petitioner, the Court, through some inexplicable misapprehension, held that the petitioner conceded the very thing he so flatly denied.

Inasmuch as the above facts are not apparent of record, petitioner attaches to this petition the affidavit of Brode B. Davis, counsel for petitioner, marked "Exhibit A," and the affidavit of Alvin V. Nygren, associate counsel, marked "Exhibit B," attesting thereto. The affidavit of petitioner stating that he never, personally or through counsel or any other person on his behalf, conceded that the decedent could appoint to her estate or her creditors, is also attached hereto, marked "Exhibit C."

B.

Petitioner's Specification of Error No. 3, Petitioner's Brief (p. 9).

"3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the

State of Wisconsin and the decision of the Supreme Court of that state to the contrary, were immaterial."

A general power is defined by federal law as follows: "Ordinarily, a general power is one to appoint to any person or persons in the discretion of the donee of the power." (Treasury Regs. 80, Art. 24). Under the federal law, the words "any person or persons" include "the donee's estate or his creditors." (Cert. Op. p. 3.)

The petitioner could not have stated more clearly that the will and deed of trust did *not* give the decedent power to appoint to any person or persons in her sole discretion, including her estate and her creditors, than does this Specification of Error to the holding of the Circuit Court of Appeals that she *did* have that power. This Specification of Error conclusively refutes the statement that "petitioner conceded that she could have appointed to her estate or her creditors."

C.

Paragraph IV of Petitioner's Summary of Argument (Br. p. 14).

> "The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers. *Cawker* v. *Dreutzer*, 197 Wis. 98."

It is an established rule of law that the donee under a *special* power *cannot* appoint to his estate or his creditors (Cert. Op. p. 3).

The *Cawker* case construed Section 232.05 of Wisconsin statutes, which provides,

> "A power is general when it authorizes the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

The Court in the *Cawker* case held, in effect, that the words of the Statutes "to any alienee whatever" did *not mean*, in the case of an appointment *by will*, that the donee could appoint to her estate or her creditors, and therefore that the donee did not hold a general power of appointment nor an absolute power of disposition.

The Wisconsin Court stated that it based its decision entirely upon the decision of the Court of Appeals of New York in *Cutting* v. *Cutting*, 86 N. Y. 522, from which case it quoted on that point. (*Cawker* v. *Dreutzer*, 197 Wis. 134, 135.)

In *Cutting* v. *Cutting*, a creditor of the donee claimed that the donee held a power of appointment, *by will*, to appoint to anyone; that this was a general power of appointment under the provision in New York Statute of Powers (1 R. S. 732, Sec. 77 (1881)), defining a general power of appointment as one "to appoint to any alienee whatever." The creditor also insisted that under the common law such a power gave to donee the right to appoint to his estate, or his creditors, and if he failed to do so, the property subject to the power became a part of donee's estate for the benefit of his creditors. The Court of Appeals held, however, that notwithstanding the words "to any alienee whatever" in the Statute of Powers, defining a general power of appointment, (from which the Wisconsin Statute on Powers was "borrowed literally,") a power to appoint *by will* (as distinguished from a deed or grant), "to any alienee" was not a general power; that the donee could not exercise it in favor of his estate or his creditors, and the property subject to the power did not become a part of the donee's estate upon his exercise of it. The court accordingly held that the creditor could not recover.

The decision of the Court of Appeals in the *Cutting* case was adopted by the Wisconsin court in *Cawker* v. *Dreutzer*

as its interpretation of the Statute of Powers in the State of Wisconsin, and it accordingly adopted the holding of the New York Court that a donee of a power to appoint *by will* could not, in Wisconsin, appoint to his estate or his creditors, and thus give to the donee "full dominion over the property as if he owned it" (Cert. Op. p. 3).

Petitioner submits that this Court should have held in the instant case that it was the duty of the Circuit Court of Appeals to examine "the local law to ascertain whether a power would be construed by the state court to permit the appointment of the donee, his estate, or his creditors, and on the basis of the answer to that question determine whether the power was general within the intent of the Federal Act" (Cert. Op. p. 3).

The Circuit Court of Appeals in the *Leser* case found in examining the local law that the Supreme Court of Maryland had held that a power to appoint *by will* "to any person" does not authorize the appointment of the donee, his estate or his creditors. Likewise, the Circuit Court of Appeals in the instant case would have found in examining the local law that the Supreme Court of Wisconsin had made a ruling similar to the ruling of the Supreme Court of Maryland in *Balls* v. *Dampman*, 69 Md. 390, cited and followed by the Circuit Court of Appeals in *Leser* v. *Burnet*, 46 F. (2d) 756. The ruling in *Cawker* v. *Dreutzer* was that the power of appointment in the Cawker will, similar to the powers in the Stephenson instruments, viz: to appoint *by will* "to any person" was not a general power of appointment. That ruling meant that, notwithstanding the words of the Wisconsin Statute "to any alienee whatever," the donee under the power could not appoint to her estate or her creditors.

D.

"Petitioner's Summary of Argument, VIII-A-3, (Brief, p. 16). The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment."

Also, argument of petitioner on page 46 of Brief:

"'The language quoted above from the will and deed of trust here is eloquent proof of his intent not to give to his children a general power of appointment, which is equivalent to 'outright ownership,' (*Fidelity Trust Co.* v. *McCaughn*, 1 F. (2d) 987, 988."

Thus petitioner denies that Isaac Stephenson intended to give to the donee what this Court holds was the result of a power to appoint to donee's estate or her creditors, to wit, "as full domination over the property as if he owned it" (Cert. Op. p. 3).

E.

Citation of *Leser* v. *Burnet*, 46 F. (2d) 756—Petitioner's Brief, p. 18.

Petitioner cited *Leser* v. *Burnet*, in support of his contention that the powers of appointment held by decedent are not general powers of appointment within the meaning of the federal law.

If petitioner had in fact conceded in this case that the decedent had the right to appoint to her estate or her creditors, how senseless would have been his citation of *Leser* v. *Burnet*, which holds that the power of appointment in the Leser deed of trust, created by words identical with the words of the powers held by decedent, viz: "to such

persons as she may appoint," did *not* give to the Leser decedent the right to appoint to her estate or her creditors. The holding in the *Leser* case was directly contrary to the petitioner's supposed concession that Elizabeth S. Morgan could appoint to her estate or her creditors.

Petitioner also relied upon the *Leser* case as a federal authority that state courts had the right to hold that a power to appoint *by will*, "to any person or persons," did not permit the donee to appoint to donee's estate or his creditors, and that such a holding was binding on the taxing power of the government. If it is not binding, the Circuit Court of Appeals in the *Leser* case could have ignored the decisions of the Supreme Court of Maryland and determined the taxing case independently of the local law. The petitioner does not understand the court to so hold in its opinion.

In view of the citation of, and reliance by petitioner upon, the case of *Leser* v. *Burnet* how can it be said that petitioner conceded that the decedent could appoint to her estate or her creditors?

F.

Heading, Petitioner's Brief; Page 31:

> "IV. The Supreme Court of Wisconsin has held that the powers of appointment similar to those in question here are special powers and not general powers."

This very heading, which recites that the powers here are special, refutes conclusively the statement that the petitioner had conceded the powers to be general powers within the meaning of the Revenue Act, and that the decedent could have appointed to her creditors. Under *no other* form of power than a general power can a donee ap-

point to his estate or creditors. Such other forms of power are designated variously as "naked," "limited," "particular," and "special" powers. 49 C. J. 1250. In the *Leser* case such a power was designated as "naked." In the *Cawker* case it was designated as "special."

To conclude; In the face of the answer of counsel for petitioner to the question of Mr. Justice Roberts, and the above excerpts from petitioner's brief and argument, it is apparent that the Court has unwittingly done an injustice to petitioner, and especially to his counsel, in its statement arising from a misunderstanding of petitioner's position, that "it is conceded in this case donee could have appointed to her estate or her creditors." Neither the briefs nor argument, oral or written, of counsel, will appear in the official volume of the United States Supreme Court Reports in which the opinion of the Court will appear. All readers of this opinion will naturally assume that the statement by the Court is correct; that counsel for petitioner through lack of legal ability or sheer stupidity, conceded away his client's case; and that he admitted, in effect, before this court, that its decision should be against the petitioner! This is a grave reflection, unintentional even though it be, upon the legal ability of counsel for petitioner and a serious damage to his professional reputation, after a practice of thirty-three years as a member of the bar of this court.

As an additional ground for a rehearing, the petitioner shows that this Court in its opinion states that Congress has adopted the administrative regulation (Treasury Reg. 80) defining a general power of appointment to be "ordinarily, one to appoint to any person or persons in the discretion of the donee of the power."

The Court thus declares the regulation a valid part of the Revenue Act, despite the fact that the word "ordi-

narily" makes the regulation, and consequently the statute, indefinite, vague, uncertain, and of limited application. (59 C. J. 601.) This administrative regulation does not define a general power for all cases. Formerly it did, in Regulations 37, but that regulation applicable in this case was amended by simply inserting the word "ordinarily" before the definition.

If Congress adopted the regulation, it adopted it with the word "ordinarily" as a part of it, and this word should be given its natural effect and not deleted from the regulation in construing its meaning and effect.

The Court was informed, during the argument, of the reason for inserting the word "ordinarily" in Regulation 80. It is not denied that the word "ordinarily" was inserted in the later regulation in order to provide for exceptions to the general rule and exclude from the operation of that rule all powers which had been held under local law *not* to be general powers, despite the fact that they were powers to appoint to any "person or persons," *by will.* As counsel for petitioner stated in his oral argument, the States in which the local law has so held, in addition to New York and Wisconsin, are the States of Pennsylvania and Vermont.

PRAYER.

Petitioner prays for the reasons herein set forth that the judgment of the Court be vacated and the cause be reheard and reconsidered; or if the judgment of this Court be that this petition must be denied, that the Court eliminate from its opinion the words shown in italics (Cert. Op. p. 2):

> "*Although it is conceded that,* under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors."

and eliminate the words shown in italics (Cert. Op. p. 3):

> "*As it is conceded that*, the decedent in this case could have appointed to her estate or to her creditors."

That in lieu of the words (Cert. Op. p. 2) "*although it is conceded that*" the following words: "*we hold that*" be substituted therefor, and that in lieu of the words (Cert. Op. p. 3) "*as it is conceded that,*" the following words: "*we hold that*" be substituted therefor.

Respectfully submitted,

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that the foregoing petition is, in our opinion, well founded in law, is not interposed for delay, and is presented in good faith.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

"EXHIBIT A"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

BRODE B. DAVIS, being first duly sworn, on oath deposes and says that he is the counsel for the petitioner in the above entitled cause; that during the oral arguments of counsel in said cause before the Supreme Court on January 4 and 5, 1940, Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?" Counsel for petitioner answered: "She could not."

BRODE B. DAVIS.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

THOMAS S. DOUGHERTY,
Notary Public.

(SEAL)

"EXHIBIT B"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

ALVIN V. NYGREN, being first duly sworn, on oath deposes and says that he is associate counsel for the petitioner in the above entitled cause; that counsel was present in the Supreme Court on January 4 and 5, 1940, while the oral arguments of counsel were being made before the Court.

Affiant further states that during the course of said arguments Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?". And that Brode B. Davis, Counsel for petitioner answered: "She could not."

ALVIN V. NYGREN.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

THOMAS S. DOUGHERTY,
Notary Public.

(SEAL)

"EXHIBIT C"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATE OF WISCONSIN }
COUNTY OF WINNEBAGO } ss.

J. EARL MORGAN, being first duly sworn, on oath deposes and says that he is the Executor of the Estate of Elizabeth S. Morgan, Deceased, and as such Executor is the petitioner in the above entitled cause.

Affiant further states that neither he nor his counsel nor any one representing him, has ever, to his knowledge, conceded, directly or by inference, by written or spoken word, that the decedent, Elizabeth S. Morgan, could have appointed to her estate or her creditors.

And further affiant sayeth not.

J. EARL MORGAN.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

R. MORRIS REDFORD,
Notary Public.

My commission expires February 6, 1944. (SEAL)

pp 2+3

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1939.

J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 29, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

We took this case because it raises an important question as to the construction of the Revenue Act of 1926, § 302(f), amended by the Revenue Act of 1932, § 803(b).[1]

The question is to what extent and in what sense the law of the decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of the statute.

The petitioner is the executor of Elizabeth S. Morgan who was the donee of two powers of appointment over property held in two trusts created by her father by will and by deed. The persons named are, or were, at death, citizens of Wisconsin. It is unnecessary to recite the terms of the trusts. Suffice it to say that under each, property remaining in the trustees' hands for Elizabeth S. Morgan was given at her death, to the appointee or appointees named in her will, with gifts over in case she failed to appoint. Under both trusts, if in the judgment of the trustees, property going to any beneficiary would be dissipated for any reason, or

[1] 44 Stat. 9, 71, 47 Stat. 169, 279; 26 U. S. C. § 411.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . . except in case of a bona fide sale for an adequate and full consideration in money or money's worth; . . ."

improvidently handled, the trustees were to withhold any part of such property; with directions for disposition, in such event, of what was withheld. The decedent appointed in favor of her husband.

The Commissioner ruled that the value of the appointed property should be included in the gross estate and determined a tax deficiency. The Board of Tax Appeals approved his action.[2] The Circuit Court of Appeals affirmed the Board's decision.[3]

Although it is conceded that under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors, the petitioner urges that, by statute and decision, Wisconsin has defined as special a power such as she held.[4] The respondent urges that this is not a correct interpretation of the State law. We find it unnecessary to resolve the issue, since we hold that the powers are general within the intent of the Revenue Act, notwithstanding they may be classified as special by the law of Wisconsin.

State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.[5]

None of the revenue acts has defined the phrase "general power of appointment". The distinction usually made between a general and a special power lies in the circumstance that, under the former,

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[2] 36 B. T. A. 588.

[3] 103 F. (2d) 636.

[4] "Sec. 232.05: *General Power.* A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

"232.06. *Special Power.* A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

See Will of Zweifel, 194 Wis. 428; 216 N. W. 840; Cawker v. Dreutzer, 197 Wis. 98; 221 N. W. 401.

[5] Burnet v. Harmel, 287 U. S. 103, 110; Bankers Coal Co. v. Burnet, 287 U. S. 308, 310; Palmer v. Bender, 287 U. S. 551, 555; Thomas v. Perkins, 301 U. S. 655, 659; Heiner v. Mellon, 304 U. S. 271, 279; Lyeth v. Hoey, 305 U. S. 188, 193.

the donee may appoint to anyone, including his own estate or his creditors, thus having as full dominion over the property as if he owned it; whereas, under the latter, the donee may appoint only amongst a restricted or designated class of persons other than himself.[6]

We should expect, therefore, that Congress had this distinction in mind when it used the adjective "general". The legislative history indicates that this is so.[7] The Treasury regulations have provided that a power is within the purview of the statute, if the donee may appoint to any person.[8]

With these regulations outstanding Congress has several times reenacted Sec. 302(f), and has thus adopted the administrative construction. That construction is in accord with the opinion of several federal courts.[9]

The petitioner claims, however, that the decision below is in conflict with two by other Circuit Courts of Appeal.[10] The contention is based on certain phrases found in the opinions. We think it clear that, in both cases, the courts examined the local law to ascertain whether a power would be construed by the state court to permit the appointment of the donee, his estate or his creditors, and on the basis of the answer to that question determined whether the power was general within the intent of the federal act.

As it is conceded that the decedent in this case could have appointed to her estate, or to her creditors, we hold that she had a general power within the meaning of Sec. 302(f). This conclusion is not inconsistent with authorities on which the petitioner relies,[11] holding that, in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income sought to be reached by the statute.

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[6] Sugden on Powers (8th Ed.), p. 394; Farwell on Powers (2d Ed.), p. 7.

[7] House Rep. No. 767, 65th Cong., 2nd Sess., pp. 21-22.

[8] Regulations 63 (1922 Ed.), Art. 25; Regulations 68 (1924 Ed.), Art. 24; Regulations 70 (1926 and 1929 Eds.), Art. 24; Regulations 80 (1934 Ed.), Art. 24.

[9] Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600; Stratton v. United States, 50 F. (2d) 48; Old Colony Trust Co. v. Commissioner, 73 F. (2d) 970; Johnstone v. Commissioner, 76 F. (2d) 55.

[10] Whitlock-Rose v. McCaughn, 21 F. (2d) 164; Leser v. Burnet, 46 F. (2d) 756.

[11] Poe v. Seaborn, 282 U. S. 101; Freuler v. Helvering, 291 U. S. 35; Blair v. Commissioner, 300 U. S. 5; Lang v. Commissioner, 304 U. S. 264.

The petitioner's second position is that, inasmuch as the trustees had an unfettered discretion to withhold principal or income from any beneficiary, they could exercise their discretion as respects any appointee of the decedent. This fact, they say, renders the power a special one. Assuming that the trustees could withhold the appointed property from an appointee, we think the power must still be held general. The quantum or character of the interest appointed, or the conditions imposed by the terms of the trust upon its enjoyment, do not render the powers in question special within the purport of § 302(f). The important consideration is the breadth of the control the decedent could exercise over the property, whatever the nature or extent of the appointee's interest.

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.